

In the Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, ET AL., PETITIONERS

v.

CATALINA FOOTHILLS SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Establishment Clause of the First Amendment prevents a government from providing a sign-language interpreter to a deaf child in a sectarian high school as part of a general program providing interpreters to similarly handicapped children in all schools.
2. Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. III 1991), or regulations promulgated under that Act, prohibit local authorities from using funds granted under the Act to provide a sign-language interpreter to a deaf child in a sectarian high school.

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INTEREST OF THE UNITED STATES

The principal question in this case is whether the Establishment Clause permits a government authority to provide a sign-language interpreter to a deaf child in a sectarian high school as part of a general program providing interpreters to similarly handicapped children in all schools. Congress's passage of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. III 1991) (IDEA), reflects Congress's determination that "State and local educational agencies have a responsibility to provide education for all children with disabilities,"

(1)

Section 1400(b)(8) (Supp. III 1991), and that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." Section 1400(b)(9) (Supp. III 1991). Accordingly, the United States has a significant interest in defending the constitutionality of the program challenged in this case.

Also, the Department of Education administers the IDEA program challenged in this case, see 20 U.S.C. 1402, and has promulgated regulations that implement the IDEA. See 34 C.F.R. Pts. 300-338. Similarly, the Department of Education provides remedial educational services to educationally deprived children in low-income areas attending private schools under Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 2701 *et seq.* (1988 & Supp. III 1991). The United States has a substantial interest in ensuring that the Court's disposition of this case is informed by the Department of Education's understanding of those programs.

The United States has participated as a party or amicus curiae in numerous cases arising under the Establishment Clause. See, *e.g.*, *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Boren v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School District v. Bell*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion."
2. 20 U.S.C. 1400 and 1412-1414 (1988 & Supp. III 1991) are reprinted in an Appendix, *infra*, 1a-14a.
3. 34 C.F.R. 76.1, 76.532, 76.650-76.662, and 300.400-300.452 are reprinted in an Appendix, *infra*, 45a-55a.
4. The Special Education for Exceptional Children Act, §§ 15-761 *et seq.*, Ariz. Rev. Stat. Ann. (West 1991), is reprinted at Pet. App. A106-A127.

STATEMENT

1. When Congress enacted the Education of the Handicapped Act in 1970 (now known as the Individuals with Disabilities Education Act (IDEA), see 20 U.S.C. 1400(a) (Supp. III 1991)), it found that there were "more than eight million handicapped children in the United States" and that "more than half of the handicapped children in the United States [id] not receive appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 91-230, § 601, 84 Stat. 175, codified as amended at 20 U.S.C. 1400(b)(1) and (3) (Supp. III 1991). Recognizing that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law," Section 1400(b)(9) (Supp. III 1991), Congress has provided in Subchapter II of the IDEA for a program of federal grants to aid state and local authorities in providing educational assistance for children with

disabilities. See 20 U.S.C. 1411-1420 (1988 & Supp. III 1991).

Those grants, together with other federal grants the Department of Education administers to assist children with disabilities,¹ currently provide more than \$2 billion each year in assistance to States and local school districts to assist those children. See U.S. Dep't of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities* A-207 (Table AG1) (1992) (Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act) [hereinafter *1992 IDEA Report*.² During the 1990-1991 school year, those programs served more than 4.3 million children, of whom about 60,000 were identified as children primarily disabled because of a hearing impairment. *1992 IDEA Report*, at 7 (Table 1.3).

The fundamental requirement for obtaining a grant under the IDEA is that the State make available "a free appropriate public education for all children with disabilities" in the State. 20 U.S.C. 1412(2)(B) (Supp. III 1991). But the IDEA's purposes are not limited to children in public schools. To the contrary, Section 1400(e) (Supp. III 1991) states that the purpose of the IDEA is to "assure that *all* children with disabilities have available * * *

¹ The Department provides grants for three- to five-year-olds with disabilities under the Preschool Grants Program, 20 U.S.C. 1419 (1988 & Supp. III 1991), and operates a special program for children with disabilities in state-operated or supported institutions as part of the larger program for educationally deprived children under the ESEA, see 20 U.S.C. 2791 *et seq.* (1988 & Supp. III 1991).

² We have lodged a copy of the *1992 IDEA Report* with the Court and provided copies to counsel for the parties.

a free appropriate public education," and "to assist States and localities to provide for the education of *all* children with disabilities" (emphasis added)." Section 1413(a)(4) (1988 & Supp. III 1991) directly addresses the State's obligations with respect to children in private schools. If school authorities have selected the private school as the means of providing a "free appropriate public education" to the child, Section 1413(a)(4)(B) (Supp. III 1991) requires the State to provide the appropriate services in all cases "at no cost to * * * parents or guardian." With respect to children placed by their parents in private schools after rejecting an appropriate public school placement, the public agency must provide for participation of such children in special education or related services only "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools." Section 1413(a)(4)(A) (Supp. III 1991).

The Secretary of Education has promulgated regulations implementing the grant program established by the IDEA. See 34 C.F.R. Pt. 300. Section 300.403(a) provides that when children with disabilities are placed in a private school by their parents' choice "the public agency is not required by this part to pay for the child's education at the private school or facility"; instead the agency is required to "make services available to the child as provided under §§ 300.450-300.452." Section 300.452, in turn, provides that the agency "shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." The meaning of this requirement is clarified by the provisions of 34 C.F.R. 76.651-76.662, which establish general

regulations for participation by private school students in the various grant programs administered by the Department of Education.³ Those regulations require the agency to "provide students enrolled in private schools with a genuine opportunity for equitable participation [in the programs offered by the agency to other students]." Section 76.651(a)(1).⁴ Benefits provided to students in private schools must "be comparable in quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." Section 76.654(a). Where "necessary to provide equitable program benefits" that are "not normally provided by the private school," the agency "may use program funds to make public personnel available" in the private school's facilities. Section 76.659.⁵

Finally, the regulations do not draw a distinction in eligibility between students in private schools that

³ That portion of Part 76 of 34 C.F.R. is made directly applicable to IDEA grants by 34 C.F.R. 300.451(b).

⁴ The Department of Education has advised us that programs funded under the IDEA during the 1989-1990 school year assisted over 43,000 children placed in private schools by their parents. Although the Department does not collect data on the proportion of those students who attend sectarian private schools, it has advised us that about 80% of the private schools in this country are sectarian.

⁵ Funds granted under the program may not be used "to finance the existing level of instruction in a private school or to otherwise benefit the private school." Section 76.658(a). Rather, funds must be used "to meet the specific needs of students enrolled in private schools." Section 76.658(b); see also Section 76.662 (prohibiting use of program funds "for the construction of private school facilities").

are sectarian and those in private schools that are not sectarian. To ensure that grants for students in sectarian schools are not used for purposes that violate the Establishment Clause of the First Amendment, 34 C.F.R. 76.532 prohibits the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization," Section 76.532(a)(1),⁶ or for activities of schools of divinity, Section 76.532(a)(4).

2. Petitioner James Zobrest is profoundly deaf. Pet. App. A4; J.A. 87. Accordingly, he requires the services of a sign-language interpreter in order to obtain the benefit of normal classroom instruction. J.A. 88. Before sixth grade, he attended a school for the deaf. Pet. App. A128; J.A. 88. He attended grades six through eight in a public school operated by respondent; respondent provided an interpreter who accompanied him to all of his classes. Pet. App. A128; J.A. 88. For religious reasons, his parents, petitioners Larry and Sandra Zobrest, who are Roman Catholics, enrolled James for the ninth grade in the Salpointe Catholic High School, a sectarian institution operated by the Carmelite Order of the Roman Catholic Church. Pet. App. A5; J.A. 89-90. When petitioners asked respondent to provide an interpreter to accompany James to his classes at Salpointe, respondent referred the matter to the Pima County Attorney, who concluded that it would violate the Establishment Clause to provide an interpreter on Salpointe's premises. J.A. 10-18. In June 1988, the

⁶ See also Section 76.532(a)(2) and (3) (prohibiting the use of federal grants to pay for "[e]quipment or supplies to be used for any of the activities specified in [Section 76.532(a)(1)]" or for "[e]construction, remodeling, repair, operation, or maintenance of any facility * * * to be used for any of the activities specified in [Section 76.532(a)(1)]").

Arizona Attorney General concurred in this opinion. Pet. App. A137.

3. Petitioners then instituted this action in the United States District Court for the District of Arizona, arguing that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide an interpreter, and that the Establishment Clause does not bar that relief. J.A. 19-26.⁷ In response to petitioners' request for a preliminary injunction, respondent "admit[ted] that the [IDEA] requires it to provide for [petitioner] * * * the services of a sign language interpreter, so long as [petitioner] is educated in a non-parochial setting," J.A. 34, but argued that the Establishment Clause prohibited it from providing an interpreter in a parochial setting, J.A. 33-40. On August 15, 1988, the district court denied petitioners' request for a preliminary injunction, accepting respondent's Establishment Clause argument and explaining that it found "no likelihood of success on the merits." J.A. 52-53. On July 20, 1989, the district court granted summary judgment for respondent. Pet. App. A35. The court stated that "the interpreter would act as a conduit for the religious inculcation of [petitioner]—thereby, pro-

⁷ The district court had jurisdiction over petitioners' action under 20 U.S.C. 1415(e)(4)(A), which grants the district court authority over actions brought to resolve disputes over the appropriate services to be provided to handicapped children under the IDEA. Although respondents initially contended that the action should be dismissed based on petitioners' failure to exhaust administrative remedies, see J.A. 45-51, the parties eventually agreed that exhaustion of administrative remedies was not required because exhaustion would be futile. See J.A. 94-95. Because respondents conceded the point in the court of appeals, see Pet. App. A6 n.2, it is not before the Court.

moting [petitioner's] religious development at government expense." *Ibid.*

4. A divided panel of the court of appeals affirmed (Pet. App. A1-A34), applying the three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). First, the court concluded that the statute passed the first prong, because "Congress made clear its secular purpose" in the introductory portion of the statute: "to assist States and Localities to provide for the education of all handicapped children." Pet. App. A8 (quoting 20 U.S.C. 1400(c) (1988)).

The court then turned to the second prong, whether the primary effect of the statute advances religion. Pet. App. A9-A13. The court concluded that the statute, as applied in this case, fails that prong, reasoning that the program creates a "symbolic union" of the type found unacceptable in *School District v. Bell*, 473 U.S. 373, 392 (1985). The court reasoned that the requested interpreter would attend classes at Salpointe that would involve religious matters and thus "would be the instrumentality conveying the religious message and experience." Pet. App. A10. In the court's view, "[b]y placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a 'joint sponsor' of the school's activities." *Ibid.*

The court distinguished *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)—cases in which this Court upheld programs that made governmental benefits available neutrally to classes defined without reference to religion, even in cases where religious entities benefited indirectly—as cases in which the government was not "required to place its own employee in the sectarian school." Pet. App.

A11. The court also rejected petitioners' claim that the secular content of the interpreter's services would be readily ascertainable, relying on the parties' concession that "the interpreter would be required to act in a school environment in which the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." Pet. App. A12-A13 (internal quotation marks omitted).⁸

Judge Tang dissented. Pet. App. A16-A34. He concluded that the statute was constitutional because of his view that "similar general educational welfare programs have passed constitutional muster" in this Court's decisions in *Witters* and *Mueller*. Pet. App. A19. He also rejected the majority's reliance on *Ball*, explaining that "[g]eneral welfare programs neutrally available to all children, in both public and private schools, do not suffer the same constitutional disability [as programs limited to private schools] because their benefits diffuse over the entire population." Pet. App. A21. Accordingly, Judge Tang would have reversed the district court.⁹

⁸ The court also rejected petitioners' Free Exercise Clause claim. Pet. App. A13-A15. Although the court agreed that denial of an interpreter would "place[] a burden on an individual's free exercise rights," it found that burden acceptable in light of what it viewed as "a compelling interest in ensuring that the Establishment Clause is not violated." Pet. App. A14. Petitioners have not challenged the Free Exercise Clause holding in this Court. Pet. 10 n.9.

⁹ During the lengthy pendency of petitioners' case before the Ninth Circuit panel (more than two years), petitioner James pursued his high school studies; he graduated on May 16, 1992, a few weeks after the panel's decision. Pet. 4. The case nevertheless presents a continuing controversy because petitioners still seek reimbursement for the cost of the inter-

SUMMARY OF ARGUMENT

1. Under this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a statute does not violate the Establishment Clause if it has a secular purpose, its primary effect does not advance religion, and it does not lead to excessive entanglement with religion. *Id.* at 612-613. The program challenged in this case passes that test.

a. The statute has a secular purpose, set forth in 20 U.S.C. 1400(e) (Supp. III 1991): "to assist States and localities to provide for the education of all children with disabilities." Neither the court of appeals nor respondent has identified any reason to doubt the sufficiency or validity of that purpose. Accordingly, the statute passes the first prong. Compare *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion of O'Connor, J.) (Court "is normally deferential to a [legislative] articulation of a secular purpose").

b. The primary effect of the statute neither advances nor inhibits religion. The challenged program is part of a general government program that dispenses benefits neutrally, without regard to whether the beneficiaries support religion, are opposed to religion, or express no opinion. This Court regularly has rejected claims that such programs have a primary effect that advances religion simply because some religious organizations might receive an indirect benefit. Instead, it has concluded that the

preter they retained. See *ibid.*; J.A. 42 (respondent's acknowledgment that petitioners "may be entitled to reimbursement from [respondent] for the additional cost of an interpreter incurred"). The record suggests that the interpreter cost petitioners approximately \$7,000 each year. J.A. 65.

primary effect is the secular effect that was the goal of the legislature. For example, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court rejected an Establishment Clause challenge to a program allowing the use of government funds to defray educational expenses of a blind student, in a case where the student used the funds to pursue theological studies at a pervasively sectarian institution. The Court should reach the same result here.

The court of appeals justified a contrary result by relying on this Court's decisions in *School District v. Ball*, 473 U.S. 373 (1985), and *Meek v. Pittenger*, 421 U.S. 349 (1975). Those cases, however, are not dispositive. Those cases involved the use of public funds to pay teachers who would teach classes in classrooms in sectarian schools. In those cases, the Court concluded that there was a substantial risk that the teaching of the publicly funded employees would be affected by the sectarian environment, which would result in the public funds being used to convey sectarian ideology. But petitioners are not asking for a publicly funded teacher; they are asking for an interpreter, who will perform an objective task not likely to be affected by the sectarian atmosphere in which he works; as a practical matter, his function is indistinguishable from that of a highly developed hearing aid. Because the interpreter is not himself teaching the child anything, the fact that his work assists the student in understanding the sectarian message of the student's teachers does not create an establishment of religion. In sum, the primary effect of the interpreter is to aid the student in understanding his teachers. That is not an effect that impermissibly advances religion.

c. Finally, the case does not pose an unacceptable risk of an excessive entanglement with religion. Because the interpreter is merely a technical facilitator of communications, there is no need for the State to monitor the interpreter's daily activities. Hence, the State's monitoring generally would be limited to the simple tasks of arranging for the interpreter's presence at the school, and assessing his qualifications for his job and his adequacy in performing that job, tasks that present no risk of interference with sectarian authorities at the school chosen by petitioners.

At bottom, the analysis of the court of appeals is inconsistent with this Court's view that the "Establishment Clause does not license government to treat religion and those who teach or practice it *** as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)). Accordingly, the judgment of the court of appeals should be reversed.

2. Neither the IDEA nor regulations promulgated under it prohibit the use of IDEA grants to provide interpreters in sectarian high schools. Although the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option, it does require the States to offer those students an equitable opportunity to participate in the services made available with federal funds to all students, and draws no distinction between students in sectarian private schools and those in secular private schools. Accordingly, nothing in the IDEA or its regulations undermines petitioners' arguments under the Establishment Clause.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT NEUTRAL GOVERNMENT PROGRAMS DESIGNED TO AID INDIVIDUALS THAT INCIDENTALLY MAY BENEFIT BOTH SECTARIAN AND NONSECTARIAN INSTITUTIONS

Under this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a statute does not violate the Establishment Clause of the First Amendment if it passes each prong of a three-pronged test: (1) it "ha[s] a secular legislative purpose"; (2) "its principal or primary effect * * * neither advances nor inhibits religion"; and (3) it does "not foster an excessive entanglement with religion." *Id.* at 612-613 (internal quotation marks omitted). Although a majority of the members of this Court have criticized the tripartite test articulated by *Lemon*,¹⁰ the

¹⁰ *E.g.*, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Edwards v. Aguillard*, 482 U.S. 573, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) ('O'Connor, J., dissenting) (expressing "doubts about the entanglement test" of *Lemon*); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled to *Lemon I* now than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary [and] superfluous tests for establishing [a First Amendment violation].").

Court has not seen fit thus far to revisit that test.¹¹ In any event, because the IDEA passes *Lemon*'s three-pronged test, it does not violate this Court's *Lemon*-based understanding of the Establishment Clause.

A. The IDEA Has a Secular Purpose: To Assist in the Education of Children with Disabilities

In this case, as in other cases involving governmental assistance programs, "[l]ittle time need be spent on the question" of whether the IDEA has a secular purpose, *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The statute sets forth its secular purpose with clarity. In 20 U.S.C. 1400(b) (1988 & Supp. III 1991), Congress set forth nine findings explaining its reasons for enacting the statute. The most relevant to this case are the eighth and ninth findings, which declare that "State and local educational agencies have a responsibility to provide education for all children with disabilities," 20 U.S.C. 1400 (b)(8) (Supp. III 1991), and that "it is in the national interest that the Federal Government assist

¹¹ The Court in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), declined our suggestion that it revisit the applicability of *Lemon* in the context of civic acknowledgment of religion, viewing the case as an instance of "state-sponsored and state-directed religious exercise in a public school," a view that led directly to the result the Court reached without the need for consideration of *Lemon*'s tripartite test. 112 S. Ct. at 2655. In our view, a straightforward application of *Lemon* does not draw seriously into question the service that petitioner was denied. If, however, the court of appeals' reasoning—or that of the district court—is deemed by this Court to be faithful to *Lemon*'s strictures, then reexamination of *Lemon*'s approach to Establishment Clause analysis would be in order.

State and local efforts to provide programs to meet the educational needs of children with disabilities," Section 1400(b)(9) (Supp. III 1991). Similarly, the next subsection, Section 1400(c) (Supp. III 1991), headed "Purpose," lists several purposes of the statute; the one relevant to the program at issue in this case explains that "[i]t is the purpose of this chapter * * * to assist States and localities to provide for the education of all children with disabilities."

Nothing in Section 1400 offers the slightest support for a finding that the IDEA has a nonsecular purpose. As Justice O'Connor explained two years ago, this Court "is normally deferential to a [legislative] articulation of a secular purpose." *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)). Accordingly, because "a plausible secular purpose for the * * * program may be discerned from the face of the statute," *Mueller*, 463 U.S. at 394-395, the IDEA satisfies the secular-purpose prong of the *Lemon* test.

B. Because the IDEA Neutrally Provides Benefits to a Class Defined Without Reference to Religion, It Has a Permissible and Secular Primary Effect

As discussed above, the IDEA is designed to assist local governments in "provid[ing] education for *all* children with disabilities," 20 U.S.C. 1400(b)(8) (Supp. III 1991) (emphasis added); the statute draws no distinction between sectarian and nonsectarian schools. Only respondent would make the program religion-conscious, because, it has conceded, it would provide an interpreter to any student with the same disability as James Zobrest, whether he was in a public school or a private school, so long as he

was not attending a sectarian private school. See Pet. App. A4-A5; J.A. 34. Accordingly, because the program offers general government benefits on a neutral basis to a class of beneficiaries defined without reference to religion—students with disabilities—it does not have an impermissible primary effect.

1. As the Court recently explained, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). On the contrary, "a program * * * that neutrally provides [government] assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983).¹² This Court's decisions offer three separate reasons to support that conclusion in this case. First, when a program distributes benefits generally, it is perverse to treat the fortuitous sectarian status of the particular institution that beneficiaries like petitioners choose to patronize as tainting the effect of the program; rather, "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263,

¹² See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) ("we must be careful * * * to be sure that we do not inadvertently prohibit [a government] from extending its general state law benefits to all its citizens without regard to their religious belief"); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 490-491 (1986) (Powell, J., concurring) ("state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test"); *id.* at 493 (O'Connor, J., concurring).

274 (1981).¹³ Second, in cases like this one,¹⁴ where the “financial benefit [is] ultimately controlled by the private choices of individual parents,” it is implausible to conclude that the primary effect of the grant is the “attenuated financial benefit” sectarian institutions receive when parents who are beneficiaries enroll their children, *Mueller*, 463 U.S. at 400; it is more natural to conclude that the “primary” effect is the benefit the program grants the parents, in this case, assistance in providing education for children with disabilities. See *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986) (upholding program where “[a]ny aid * * * that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients”).¹⁵ Third, a

¹³ See *Board of Education v. Mergens*, 496 U.S. at 248 (same) (plurality opinion of O’Connor, J.); *Mueller*, 463 U.S. at 397 (same).

¹⁴ As discussed above, regulations under the IDEA prohibit the use of federal funds “to finance the existing level of instruction in a private school or to otherwise benefit the private school.” 34 C.F.R. 76.658(a).

¹⁵ The court of appeals concluded (Pet. App. A11) that this line of reasoning is inapplicable here because the program would involve the government placing one of its employees in a sectarian school. We see no logical force to that argument. The location of the employee is irrelevant to the question of why he is there; it is clear that the employee would be placed in a sectarian school only if the parents choose to enroll their child there. What the court of appeals really seems to be suggesting is that the Establishment Clause flatly prohibits placing any public employee in a sectarian school. As we explain below, that suggestion is inconsistent with this Court’s decisions.

contrary course of reasoning would lead to absurd results, inconsistent with the traditions of our Nation that have informed this Court’s understanding of the Establishment Clause: “If the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments or have its public sidewalk kept in repair.” *Widmar*, 454 U.S. at 274-275 (internal quotation marks omitted). In *Witters*, this Court applied that principle to a program strikingly similar to the one at issue here, which allowed the use of government funds to defray the educational expenses of certain handicapped students. In our view, the court of appeals erred in refusing to apply the same principle to this case.

2. The decision of the court of appeals rested on its view that a contrary result was required by this Court’s decisions in *School District v. Ball*, 473 U.S. 373 (1985), and *Meek v. Pittenger*, 421 U.S. 349 (1975). We disagree. In those cases, this Court was concerned that the statements of teachers paid by public funds to teach classes in sectarian classrooms would be affected by the sectarian aspects of the atmosphere in which they taught, so that there was an unacceptable chance that public funds would be diverted into religious uses.

Contrary to the court of appeals’ understanding, *Ball* and *Meek* do not establish a flat rule prohibiting the government from “plac[ing] its own employee in the sectarian school,” Pet. App. A11. Instead, the Court has made clear that the concern on which those decisions rest arises out of the confluence of (a) an individual whose task is sufficiently subjective to allow for the gradual insinuation of sectarian ideology, and (b) the sectarian atmosphere that exists

in the classrooms of a sectarian school.¹⁶ For example, in *Wolman v. Walter*, 433 U.S. 229 (1977), the Court made clear that the Establishment Clause permitted the provision of public health services to students in sectarian schools. *Id.* at 242. Similarly, the Court concluded that diagnostic speech and hearing services could be provided at the same locations,¹⁷ explaining that “[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student.” *Id.* at 244; see *id.* at 247 (therapists should be treated differently, based on the “danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction”).

Application of that reasoning to this case mandates reversal of the judgment of the court of appeals. An interpreter’s task, unlike a teacher’s, does not involve subjective choices that pose a substantial risk of the intrusion of sectarian ideology. Ethical guidelines require interpreters to “render the message faithfully, always conveying the content and spirit of the speaker.” J.A. 72. Moreover, as one commentator has noted, it would be quite difficult for an interpreter to insinuate sectarian ideas into his translation of a teacher’s comments “given the single-minded concentration required to perform the job.” Dixie Snow Huefner & Steven F. Huefner, *Publicly Financed Interpreter Services for Parochial School*

¹⁶ Cf. *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991) (permissible in appropriate circumstances to provide educational services on publicly owned and controlled mobile units parked on the sectarian school’s property).

¹⁷ See *Meek*, 421 U.S. at 371 n.21 (same).

Students with IDEA-B Disabilities, 21 J.L. & Educ. 223, 236 n.65 (1992). At bottom, an interpreter is analytically indistinguishable from a hearing aid, which adds nothing to the message conveyed by the teacher. It may be that the sectarian teacher is conveying sectarian ideas, but the interpreter is doing nothing more than translating those ideas so the student can understand what is being said. That activity does not raise a significant Establishment Clause concern.

In sum, the IDEA is a neutral government program dispensing aid to children with disabilities. The primary effect of the program is to increase the educational opportunities for children with disabilities. Because that effect is decidedly secular, the program passes scrutiny under the second prong of the *Lemon* analysis.

C. The IDEA Does Not Result in Excessive Entanglement with Religion

The government activities necessary to administer a grant providing for an interpreter in a sectarian school do not result in an excessive entanglement with religion. The only significant administrative tasks would be ensuring in the first instance that the interpreter was qualified, making arrangements with the school officials to accommodate the presence of the interpreter, and monitoring the interpreter’s performance from time to time to ensure that he was performing his job in an adequate manner. Those tasks do not involve government officials in any way with the sectarian administration of the private school and thus cannot involve the “comprehensive, discriminating, and continuing state surveillance

necessary to run afoul of [the entanglement] standard." *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (internal quotation marks omitted). Nor is there any need for the State to engage in any continuing surveillance of the interpreter's activities at the school "to guard against the infiltration of religious thought." *Aguilar v. Felton*, 473 U.S. 402, 413 (1985). When the government has a neutral program providing public health services on a sectarian school's premises, and the program passes the primary effect prong because there is not "an impermissible risk of the fostering of ideological views, [i]t follows that there is no need for excessive surveillance, and there will not be impermissible entanglement." *Wolman v. Walter*, 433 U.S. 229, 244 (1977).

* * * * *

In sum, the holding of the court of appeals construes the Establishment Clause to require respondent to put petitioners to a choice between their sincerely held religious beliefs and James's acknowledged need for an interpreter to enable him to secure an appropriate education. This Court's decisions do not require such a choice. The decision of the court of appeals should be reversed.

II. NEITHER THE IDEA NOR REGULATIONS UNDER THE IDEA BAR RESPONDENT FROM PROVIDING AN INTERPRETER TO A DEAF CHILD IN A SECTARIAN HIGH SCHOOL

Respondent argued in its brief in opposition to the petition (Br. in Opp. 13) that 34 C.F.R. 76.532 bars respondent from providing an interpreter to a deaf child in a sectarian high school. That argument is incorrect. To be sure, the IDEA does not specify the

precise types of assistance educational agencies must provide to students placed in private schools by their parents. Instead, agencies must make services available to such students "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools." 20 U.S.C. 1413(a)(4)(A) (Supp. III 1991). By regulation, the Secretary of Education has interpreted that provision to require local agencies to "provide students enrolled in private schools with a genuine opportunity for equitable participation" in the programs the agency offers to other students. 34 C.F.R. 76.651(a)(1).

As noted above, respondent's argument rests on 34 C.F.R. 76.532(a)(1), which prohibits the use of federally granted funds to pay for "[r]eligious worship, instruction, or proselytization." But that regulation does nothing more than implement the Secretary's understanding of the requirements of the Establishment Clause, which would prohibit the direct use of federal funds for such overtly religious purposes. It does not suggest in any way that the Department would prohibit respondent from offering a facially neutral program—identical to that available for children in public and nonsectarian private schools—to parents who had enrolled their child in a sectarian school.¹⁸ Because the service requested here would be used to overcome James Zobrest's hearing defect, rather than for religious worship, in-

¹⁸ See Brief for the United States as Amicus Curiae, at 21 n.11, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (O.T. 1985) (explaining this interpretation of Section 76.532(a)(1)).

struction, or proselytization, the service would be consistent with the regulation.¹⁹

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1992

¹⁹ As this discussion should make clear, we do not agree with the interpretation placed on this regulation by the Fourth Circuit in *Goodall v. Stafford County School Board*, 930 F.2d 363, 369, cert. denied, 112 S. Ct. 188 (1991). We note that the Fourth Circuit did not have the benefit of the Secretary of Education's views when it construed Section 76.532 in *Goodall*.

APPENDIX

20 U.S.C. 1400, 1412-1414 (1988):

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one-million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(1a)

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged

eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving

an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so,

and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2791 et seq.] and section 2332 (1) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for—

(A) the development and implementation of a comprehensive system of personnel development, which shall include—

(i) inservice training of general and special educational instructional and support personnel,

(ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and

(iii) effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and

(B) adopting, where appropriate, promising educational practices and materials developed through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by provid-

ing for such children special education and related services; and

(B) that—

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter,

and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for—

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under [sic] under this subchapter—

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handi-

capped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subchapter if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education offi-

cials, and administrators of programs for handicapped children, which—

(A) advises the State educational agency of unmet needs within the State in the education of handicapped children,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement; and

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry

out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

(1) The Secretary shall approve any State plan and any modification thereof which—

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) **Participation of handicapped children in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court**

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2) (A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all handicapped children enrolled in the

State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3) (A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for handicapped children within the State.

§ 1411. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not re-

- ceiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;
- (iii) the participation and consultation of the parents or guardian of such children; and
- (iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;
- (D) establish a detailed timetable for accomplishing the goal described in subclause (C); and
- (E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) to provide satisfactory assurance that—

- (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;
- (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

- (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children; and
- (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and
- (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for—

- (A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and
- (B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency

or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(e) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2) (A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications —

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an

individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph 7 of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a) (2)(B)(ii) of this section, any local educational agency which is required to carry out any program

for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

20 U.S.C. 1400, 1412-1414 (Supp. III 1991):

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the “Individuals with Disabilities Education Act”.

(b) Findings

The Congress finds that—

(1) there are more than eight million children with disabilities in the United States today;

[See main edition for text of (2)]

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

[See main edition for text of (6)]

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective spe-

cial education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all children with disabilities, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

[See main edition for text of (D) and (E)]

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabili-

ties, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public educa-

tion to be provided children with disabilities in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

[See main edition for text of (1)]

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of

1965 [20 U.S.C. 2791 et seq.], under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in section 1476(b)(8) of this title, a comprehensive system of personnel development that shall include—

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including—

(i) the development and maintenance of a system for determining, on an annual basis—

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed, and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors;

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including—

(I) the numbers of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that—

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of

higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including—

(i) a system for the continuing education of regular and special education and related services personnel;

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.¹

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing

¹ So in original. The period probably should be a semicolon.

for such children special education and related services; and

(B) that—

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

[See main edition for text of (ii), (5) to (8)]

(9) provide satisfactory assurance that Federal funds made available under this subchapter—

[See main edition for text of (A)]

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Fed-

eral, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

[See main edition for text of (10)]

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities, teachers, parents or guardians of children with disabilities, State and local education officials, and administrators of programs for children with disabilities, which—

(A) advises the State educational agency of unmet needs within the State in the education of children with disabilities,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for dis-

tribution of funds under this subchapter, and

[See main edition for text of (C)]

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

[See main edition for text of (A)]

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State; and

(15) set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program assisted under subchapter VIII of this chapter who will participate in preschool programs assisted under this subchapter, including a method of ensuring that when a child turns age three an individualized education program, or, if consistent with sections 1414(a)(5) and 1477(d) of this title, an individualized family service plan, has been developed and is being implemented by such child's third birthday.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for children with disabilities, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

[See main edition for text of (c)]

(d) Participation of children with disabilities in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the

participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2) (A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all children with disabilities enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

[See main edition for text of (B) and (C), (3)]

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State.

§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall

submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

[See main edition for text of (B)]

(C) establish a goal of providing full educational opportunities to all children with disabilities, including—

[See main edition for text of (i)]

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all children with disabilities, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability, with

the most severe disabilities who are receiving an inadequate education;

[See main edition for text of (iii) and (iv), (D) and (E)]

(2) provide satisfactory assurance that—

[See main edition for text of (A)]

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only the excess costs directly attributable to the education of children with disabilities; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant such State and local funds; and

[See main edition for text of (C)]

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement

of children with disabilities participating in programs carried out under this subchapter; and

[See main edition for text of (B), (4)]

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in section 1477(d) of this title for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

[See main edition for text of (6) and (7); (b)]

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c) (4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively

meet the educational needs of children with disabilities.

[See main edition for text of (2)]

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

[See main edition for text of (1) and (2)]

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by such agency with State and local funds otherwise available

to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all children with disabilities residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a) (2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of children with disabilities pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

34 C.F.R. 76.1, .532, .650-.662, and 300.400-452:

Subpart A—General

REGULATION THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which Part 76 applies.

- (a) The regulations in Part 76 apply to each State-administered program of the Department.
- (b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "State formula grant program" means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

§ 76.532 Use of funds for religion prohibited.

- (a) No State or subgrantee may use its grant or subgrant to pay for any of the following:
 - (1) Religious worship, instruction, or proselytization.
 - (2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.
 - (3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

- (1) Prepare them to enter into a religious vocation; or
- (2) Prepare them to teach theological subjects.

**PARTICIPATION OF STUDENTS ENROLLED
IN PRIVATE SCHOOLS**

§ 76.650 Private schools; purpose of §§ 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These "bypass" provisions—where they apply—are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a) (1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b) (1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

- (1) Which children will receive benefits under the project;
- (2) How the children's needs will be identified;
- (3) What benefits will be provided;
- (4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The application or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participating of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

- (a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.
- (b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.
- (c) The number of students enrolled in private schools who will receive benefits under the program.
- (d) The basis the applicant used to select the students.
- (e) The manner and extent to which the applicant complied with § 76.652 (consultation).
- (f) The places and times that the students will receive benefits under the program.
- (g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

- (a) The classes are at the same site; and
- (b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

- (a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.
- (b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:
 - (1) The needs of a private school; or
 - (2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

- (a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and
- (b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

- (a) The employee performs the services outside of his or her regular hours of duty; and
- (b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

Subpart D—Private Schools**HANDICAPPED CHILDREN IN PRIVATE SCHOOLS
PLACED OR REFERRED BY PUBLIC AGENCIES****§ 300.400 Applicability of §§ 300.401-300.402.**

Sections 300.401-300.402 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services—

(1) In conformance with an IEP which meets the requirements of §§ 300.340-300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements in this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

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(a) Monitor compliance through procedures such as written reports, onsite visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a handicapped child has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.515.

(Authority: 20 U.S.C. 1412(2)(B); 1415)

CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS

§ 300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled

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by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.451 State educational agency responsibility.

The SEA shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements in 34 CFR 76.651-76.662 are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.452 Local educational agency responsibility.

(a) Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.